IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 3048 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 195
JJJJ

Section 401 read with Section 397 of the Criminal Procedure Code, 1973 (for short Cr.P.C.) filed by the original complainant Vinaben Kaniyalal challenging the correctness, legality and propriety of an acquittal order dated 17-7-1987, passed by the learned Metropolitan Magistrate, Court No. 5 at Ahmedabad by rendering judgment in Summary Case No. 712 of 1986 which was registered on the basis of charge sheet filed by the police.

#. The facts leading to this Criminal Revision Application can be summarised in brief as follows:-

The original complainant Vinaben Kaniyalal had lodged complaint against the present respondent No.2 and 3 in the Police Station. As per that complaint, it is stated that complainant Vinaben and Subhadraben are the sisters and their father is one Dalsukhbhai. Respondent No.2 Mohanlal Gangaram Harijan, i.e. accused No.1 is husband of elder brother of husband of Vinaben and respondent No.3 i.e. accused No.2 Rajnikant Mohanlal Harijan is the son of accused No.1. It is the case of the complainant that on or about 25-2-1986 at about 20.00 hours both the accused had come to house of Vinaben. They had come to make a complaint to Dalsukhbhai that Subhadra was giving abuses to them.

#. Before that some incident had taken place and as per that incident as alleged by the accused they had lodged one complaint against Vinaben and Subhadraben for causing injuries to Kalpana daughter of accused No.1 by pulling her (Kalpana's) hairs and that case was pending in the Court.

In continuation of that earlier incident, both the accused had come to the house of Vinaben and accused had given abuses to Vinaben and Subhadraben and therefore accused No.1 Mohanlal Gangaram Harijan had caused a grievous hurt on last finger of right-foot of Vinaben resulting into a fracture. It is also the case of the complainant that both the accused gave blows of kicks and fists to complainant, her sister Subhadraben and their father Dalsukhbhai. One Samptabhai came and rescued the complainant and her parental relatives. Therefore, the complainant lodged a complaint against both the accused in the Police Station and consequently police investigated the case and ultimately filed a charge sheet in the Court.

#. Looking to the complaint and police papers, the learned Metropolitan Magistrate Court No.5, Ahmedabad

tried the case against both the accused summarily. Their plea was recorded on 31-3-1986. That plea was recorded for offences punishable under Section 325, 323, 504 and 114 of the I.P.C. The prosecution examined four witnesses. Ultimately after the evidence of prosecution being declared as closed and after hearing both the parties, the learned Metropolitan Magistrate acquitted both the accused, by rendering a judgment on 17-7-1987.

#. Being aggrieved against and dissatisfied with the said judgment the original complainant has preferred this Criminal Revision Application.

#. I have heard the learned advocate Shri N.S. Sheth for the Revision-petitioner and learned A.P.P. Ms. Kathaben Gajjar for the Respondent No.1 State. Respondents Nos. 2 and 3 have remained absent, though duly served with notices of this Court. I have gone through the Records and Proceedings of Criminal Case No. 712 of 1986 called from the lower court.

#. Before considering the submissions of learned advocate Shri Sheth, it would be necessary to know the scope and powers of this Court while deciding this type of Criminal Revision Application.

In Khetra Basi Samal and another v. State of Orissa etc. AIR 1970 SC 272 the Hon'ble Supreme Court has given certain guidelines to High Courts. That case was under Section 439 of the old Criminal Procedure Code, 1898 Section 439 (old) Criminal Procedure Code, 1898 is analogous to present Section 401 of the Criminal Procedure Code, 1973. It has been held in that case that the revisional jurisdiction conferred on the High Court u/s. 439 Cr. P.C. 1898 is not to be lightly exercised when it is invoked by a private complainant against an order of acquittal against which the Government has a right of appeal. The revisional jurisdiction should be exercised by the High Court only in exceptional cases when there is some glaring defect in the procedure and there is manifest error on a point of law and consequently there has been a flagrant miscarriage of justice.

In Patel Bachu Rajshibhai v. Patel Harivallabh Ishwarlal and Others 1996(1), 37(1) GLR 431 this court has made it clear that the High Court in exercise of its powers while dealing with or disposing of the acquittal appeal should be slow to disturb the order of acquittal, unless the judgment of the trial court is found to be perverse or there is manifest error or illegality in

recording the order of acquittal.

#. Shri N.S. Sheth, the learned advocate for the Revision Petitioner has submitted to this Court that on 7-1-1987 the learned APP Shri A.R.Patel who appeared for the prosecution in the trial court had submitted one application requesting Court to issue a witness-summons against Medical Officer, and on that ground he sought an adjournment. The learned Magistrate passed a Judicial order rejecting that application. He argued that the learned Magistrate prevented the prosecution from leading material oral evidence of Medical Officer, and thereby prejudice has been caused to the case of the prosecution, and in that circumstances this is a fit case in which this court should exercise its judicial discretion in favour of the complainant and set aside the acquittal order.

#. During the course of arguments learned A.P.P. has made it clear that the State of Gujarat has not preferred any appeal under Section 378(1) of the Criminal Procedure Code, 1973 challenging the order of acquittal and therefore it can be said that State Government thought it fit not to prefer an appeal against the acquittal order. Shri N.S. Sheth has submitted that because the prosecution has not preferred any appeal against the order of acquittal the complainant has been constrained to file this Criminal Revision Application. He has argued that for prosecution before the lower court an evidence of Medical Officer was very much necessary to prove the fracture injury on the last finger of right foot of complainant. Shri Sheth has further argued that looking to an application dated 7-1-1987, the learned APP before the trial court had submitted to the learned Metropolitan Magistrate that witness summons issued against Medical Officer was not returned served or unserved and Medical Officer being an important witness was required to be examined by the prosecution and therefore witness summons be issued and for that a short adjournment be granted. Below that application the learned Magistrate has passed a speaking reasoned order and then rejected that application.

##. On reading that order below the said application, it appears that the learned Magistrate has observed that plea of the accused was recorded on 31-3-1986, and thereafter sufficient opportunity was given to prosecution to lead evidence. It is further stated by the learned Magistrate that prosecution has examined four witnesses and last witness was examined on 10-10-1986. It means that after 10-10-1986 sufficient opportunity was

given to prosecution till 6-1-1987 to produce Medical Officer before the trial Court and examine him as prosecution witness in the case. Nearly about three months' time was granted. It is further observed by the learned Magistrate that Court had issued witness summonses to be served on Medical Officer as well as Investigating Officer for many times but the police has not returned that witness summonses either served or unserved and therefore the learned Magistrate further concluded that he saw no other reasonable and just reason to prolong the case and therefore he rejected that application.

##. Looking to the aforesaid order passed below application dated 7-1-1987, it is crystal clear that prosecution was granted a sufficient time to produce and examine the witnesses. Witness summonses were issued from time to time but prosecution failed to effect the services of witness summons on Medical Officer though sufficient opportunity was given. It is not the case of the Revision Petitioner that the learned Magistrate closed the evidence immediately on the next date after plea of accused was recorded.

##. As seen from order, plea was recorded on 31-3-1986 and during the period from 31-3-1986 to 10-10-1986 prosecution examined four witnesses. During that period, prosecution could have produced Medical Officer and examined him in the case. Even thereafter the learned Magistrate waited for further three months but prosecution failed to produce and examine the Medical Officer and therefore this is not a case in which it can be said that no sufficient opportunity was given to the prosecution.

##. It is pertinent to note that prosecution did not prefer any Criminal Revision Application challenging the correctness, legality and propriety of the order dated 7-1-1987 to the competent court and therefore that order stands effective and operative as it is. Even after 7-1-1987 the learned Magistrate waited for six months and then passed an acquittal order which is challenged in this revision application, on 17.7.1987. Thus, this is a case in which sufficient opportunity was given to prosecution and after considering the facts on record the learned Magistrate rejected that application dated 7-1-1987.

##. Shri N.S. Sheth has argued that due to negligence on part of police, case of complainant has been seriously damaged and therefore also this Criminal Revision

Application requires to be decided by this Court. He has further argued that it was no fault on the part of the complainant for not producing the Medical Officer before the Court. As per his arguments, it was the duty of the police to serve the witness summons on Medical Officer and to produce him before the Court for recording his evidence. True, it was not the duty of the complainant to serve the witness summons on the Medical Officer. The case in which acquittal order came to be passed was a police case registered on the basis of charge sheet and therefore as per the procedure prescribed in the Cr.P.C. only the learned APP can appear before the Court and conduct the case. If really complainant who is a private party was interested to see that her case is properly conducted by the APP, she could have appeared before the court through her own private advocate and she could have assisted the APP. But in this case complainant has not taken any care for her case and therefore now no fault can be found with the prosecution that because police did not serve the witness summonses on Medical Officer, the learned Magistrate rejected the application and prosecution failed to lead medical evidence on record to prove the fracture injury on the last finger of right foot of the complainant.

##. The learned Magistrate has acquitted both the accused under Section 248(1) Cr.P.C. and therefore the learned Magistrate has followed the procedure prescribed in Part A of Chapter XIX of Cr.P.C. as the case of the complainant was instituted on a police report. As the learned Magistrate was invested with the powers under Section 260 of the Cr.P.C. to try the cases summarily the learned Magistrate recorded the plea of the accused on 31-3-1986 and then followed the provisions contained in Part A of Chapter XIX of Cr.P.C. As per subsection (1) of Section 242 Cr.P.C. when accused refuses to plead or does not plead or claims to be tried then the Magistrate shall fix a date for the examination of the witnesses, and as per subsection (2) of Section 242 Cr.P.C. the Magistrate may on the application of the prosecution issue witness summons to any of its witnesses directing him to attend or to produce before the Court and as per subsection (3) of Section 242 Cr.P.C. on the date so fixed the Magistrate shall record all such evidence as may be produced in support of the prosecution, and therefore the duty is cast on the prosecution to produce the witnesses. To secure the presence of the witnesses the prosecution can request the Magistrate to issue witness summons, but ultimately the responsibility to produce the witness before the Court is on the prosecution. In this case sufficient opportunity

was given to the prosecution to produce the Medical Officer and examine him in the case. If really complainant wanted to see that her case is tried properly she could have requested the court through her advocate to issue witness summonses. This Court is conscious that such case has to be conducted by the learned APP and not by the private complainant but to secure the presence of the witness she could have atleast requested the court to issue witness-summons for the Medical Officer. After rejection of application dated 7-1-1987, he passed an order of acquittal on 17-7-1987. Even during the period from 7-1-1987 to 16-7-1987, complainant could have appeared before the Court and could have submitted application to issue a witness summons for Medical Officer and therefore looking to the facts and circumstances of the case, this court is of the view that the learned Magistrate has not passed any illegal order. It appears that there is no manifest error on a point of law and looking to the facts of the case, it cannot be said that there is a flagrant miscarriage of justice and therefore this Criminal Revision Application cannot be entertained.

##. It may be noted that the charge sheet on the basis of complaint was filed in Court on 25-2-1986. An order of acquittal came to be passed by learned Magistrate on 17-7-1987. Today we are in the month of March 2000. A period of about twelve and half years have passed. When this Court has called for R&P from the lower court vide order dated 18-02-2000 it is found that except judgment there is no other paper in the file of the case before the lower court. Possibly when a criminal case has ended into acquittal and there is no stay from any superior Court, naturally after prescribed period, as per paras. 362 and 363 of the High Court Criminal Manual, the lower Court must have destroyed all the papers by retaining only the judgment and therefore for a moment if it is believed that if case is remanded to the trial court, then no useful purpose will be served by remanding the case, because before the lower court there would be no other papers except the judgment and therefore considering that fact also it would not be just and proper in the interest of justice to set aside the order of the acquittal.

##. In view of the discussion made hereinabove this Court is not inclined to interfere with the order of acquittal more particularly in Criminal Revision Application and therefore this Criminal Revision Application deserves to be dismissed and accordingly this Criminal Revision Application is dismissed.

(H.H. Mehta, J)